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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-2185

RUETTA PARIS, MILDRED CAWTHON AND MARGE KANE, INDIVIDUALLY, AND ON BEHALF OF THE CERTIFIED CLASS,

Petitioners,

v.

PROFIT SHARING PLAN OF HOWARD B. WOLF, INC., AND EUGENE K. FRIESEN,

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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To the Supreme Court of the United States:

OPINION BELOW

The opinion of the Fifth Circuit is reported at 637 F.2d 357. The opinion of the District Court for the Northern District of Texas is unreported.

QUESTION PRESENTED

Whether, in the absence of an important federal question, the Court should grant the Petition to review the Fifth Circuit's decision, affirming the decision of the district court,

that the trustees of a profit sharing plan acted in neither an arbitrary nor a capricious manner in determining that petitioners were ineligible to receive plan benefits where the language of the plan did not include petitioners among its participants?

COUNTER-STATEMENT OF THE CASE

Petitioners are former employees of Howard B. Wolf, Inc. or its subsidiary, Marcy Lee, Inc., whose employment ceased after June 1, 1973, but before February 21, 1974. Before ceasing employment, petitioners participated in a Trust Retirement Plan for employees of Howard B. Wolf, Inc. On February 21, 1974, after petitioners' employment ceased, the boards of directors of the companies passed two identical resolutions adopting for each company the Profit Sharing Plan for Employees of Howard B. Wolf, Inc. (hereinafter "the Plan") and terminating the pension plan, both effective June 1, 1973. The stated purpose of the Plan is to enable employees to share in the profits of the corporation, and to distribute the corpus and the income of the funds accumulated by the Trust in accordance with the Plan, to the participants or their beneficiaries.

Petitioners, seeking inclusion in the Plan, claim the trustees acted in an arbitrary and capricious manner in determining their ineligibility as non-participants in the Plan. As employees whose employment was terminated even before the Plan was adopted, they contend that they are participants in the Plan and that Plan benefits have been wrongfully withheld.

The Fifth Circuit applied here the rule that the decision of eligibility for plan benefits is a matter concerning which the "clear weight of federal authority mandates that trustees' determinations of eligibility are enforceable unless arbitrary or capricious." (637 F.2d at 362). In affirming summary judgment for respondents, the Fifth Circuit found that the trustees' determination that petitioners are, as non-participants, ineligible to receive Plan benefits, withstands strict scrutiny and was neither arbitrary nor capricious. Further, the Court, addressing petitioners' claim that the Plan administrator was liable for non-compliance with petitioners' request for Plan information, disposed of the argument, saying:

> The short answer may be that since the plaintiffs were not participants they were not entitled to any information... We cannot say that the district court abused its discretion.

(637 F.2d at 362).

ARGUMENT

1. The Fifth Circuit correctly ruled that the trustees' decision determining that petitioners, as non-participants in the Plan, are ineligible to receive its benefits withstands strict scrutiny under the "arbitrary and capricious" standard.

Petitioners concede at page seven of the Petition that:

> The sole issue under both questions presented here is whether or not petitioner-employees can be excluded as participants in the defendant plan in spite of the express language to the effect that all employees on the effective date of June 1, 1973, were included, merely

because the plan was formally adopted after the termination of petitioner employees.

Petitioners' very statement of the issue demonstrates that, on the record here, there is no reason why the writ should be granted. Petitioners raise no important federal question but simply continue an effort, rejected both by the district court and by the Fifth Circuit, to constitute themselves as participants in the respondent Plan where it does not so provide.

The Fifth Circuit, citing *Bayles v. Central States, Southeast and Southwest Areas Pension Fund*, 602 F.2d 97, 99, 100 (5th Cir. 1979), held that, under federal law, the determinations of trustees of a pension plan are to be upheld unless they are arbitrary or capricious. (637 F.2d at 362). Applying the "arbitrary and capricious" standard to the determination of the Plan trustees, the Fifth Circuit correctly concluded that the trustees' determination that petitioners, as non-participants, are ineligible to receive Plan benefits withstands strict scrutiny under the "arbitrary and capricious" standard. The Fifth Circuit expressly found that the Plan trustees treated all persons in petitioners' class the same, that the Plan's resources are still dedicated to its participants and that the trustees properly directed benefits only to those who were employed on the adoption date of the Plan. (637 F.2d at 362).

The "arbitrary and capricious" standard as applied to scrutinize the determinations of trustees in administering benefit plans is enunciated by the Fifth Circuit in *Bayles, id.*

at 99-100. The clear weight of federal authority mandates that trustees' determinations of eligibility are to be upheld unless arbitrary or capricious. *Bayles, id.; Bueneman v. Central States, Southeast & Southwest Areas Pension Fund,* 572 F.2d 1208 (8th Cir., 1978) (upholding the trustees' determination refusing retroactive participation). Both *Bayles* and *Bueneman* articulate the rule that judicial intervention concerning the determinations of plan trustees is limited and courts are hesitant to interfere with the administration of a plan.

Both the Employee Retirement Income Security Act of 1974 ("ERISA") and the common law of trust require that trustees discharge their duties with respect to a plan solely in the interest of providing benefits to their beneficiaries, and defraying reasonable expenses of administering the plan. 29 U.S.C. § 1104. The trustees here, relying on the language of the Plan, reasonably determined that petitioners were, as non-participants, ineligible to receive Plan benefits. In so determining, the trustees conserved the stated benefits of eligible participants under the Plan, and the Fifth Circuit so held.

As the Fifth Circuit noted in its opinion at page 362, the Plan trustees' determination of ineligibility comports with the standards to be followed where eligibility is in issue. *See Sparta v. Lawrence Warehouse Co.,* 368 F.2d 227, 228 (3rd Cir. 1966), holding in pertinent part:

> The trustees of a pension fund may properly enforce the pension plan rules limiting pension benefits if an alternative would require inappropriate or unanticipated

> costs to the fund so as to potentially limit resources available to the proper beneficiaries of the trust.

Scrutinizing strictly the determination of the Plan trustees that petitioners are ineligible as non-participants, the Fifth Circuit correctly ruled that the trustees' determination was neither arbitrary nor capricious. The Fifth Circuit held:

> The trustee's decision withstands scrutiny under this standard. *Contra, Tucci v. Edgewood Country Club*, 459 F. Supp. 940, 941-42 (W.D.Pa. 1978) (similar facts, suspect termination; no enunciated standard of review). He treated all similarly situated persons the same. *See Bayles*, 602 F.2d at 100; *Bueneman*, 572 F.2d at 1210. The Profit Sharing Plan's resources are still dedicated to the participants; the trustee's policy will direct money to those who were employed on the adoption date.

Opinion at page 362.

Petitioners have not shown that the Fifth Circuit incorrectly applied the "arbitrary and capricious" standard in scrutinizing strictly the trustee's decision and in finding that decision to withstand scrutiny. Instead, without any standing to do so, the petitioners merely complain in this connection concerning claimed inequities in the allocation of Plan benefits as between the 148 participants whom the trustees deemed eligible to receive benefits. Petitioners' argument offers no reason for any review of the trustees' determination that Petitioners themselves, as non-participants, are ineligible to receive Plan benefits.

2. The Fifth Circuit correctly affirmed the judgment of the district court that petitioners are not participants in the Plan.

Petitioners are not offerees of the Plan, which was established "for the purpose of enabling employees to share in the profits of the corporation". They were not employees of either of the companies at the time the Plan was adopted. The Plan does not provide for "former employees", nor did it bind former employees in any way. "Employees", as that term is used in the Plan, can only mean those persons employed on or after the date it was adopted and the offer was made.

In *Sparta, supra*, the Third Circuit recognized the impossibility of a former employee being an offeree of a unilateral contract which could be accepted only by performance. The facts of *Sparta* differ from those of the present case in only one significant respect: the court there construed an amendment to a pension plan, rather than the termination of an old plan and the subsequent creation of a new plan. In *Sparta*, employees whose employment had terminated before the change in the pension plan was adopted argued that they were included in the amended plan by virtue of a provision making the plan retroactive. The Third Circuit rejected this argument, affirming the district court's decision that the plan was applicable only to those who were employees when the revision was adopted.

Petitioners argue, as they already have below, that *Sparta* is superceded by *Tucci v. Edgewood Country Club*, 459 F.Supp. 940 (W.D. Pa. 1978). *Tucci* is readily distinguish-

able from the case before this Court in that the plan in *Tucci* contained language which specifically named the plaintiffs as participants:

> All persons covered under the existing plan on May 31, 1975, will be covered under the restated plan . . .

Tucci at 942.

No such express language is present in this Plan. *Tucci* does not cite *Sparta*, and there is nothing to indicate that *Tucci* stands for a proposition contrary to *Sparta*.

Petitioners attack *Sparta* on the ground that the language of the plan construed is unknown. The court in *Sparta* did not refer to such language, probably because such a reference was not necessary. Basic principles of contract as set forth in the *Sparta* opinion required the court to conclude that an offer of participation in a profit sharing plan can only be accepted by continued employment. The same is true here.

Unlike *Tucci*, the language of the Plan before this Court simply does not include petitioners as participants. The Plan distinguishes between its effective date and its establishment date. Under the heading "Purpose of the Plan", the specific language provides:

> "This Agreement, *establishing* the profit sharing plan for employees for Howard B. Wolf, Inc., is effective as of June 1, 1973, and *is established* by Howard B. Wolf, Inc. . . . for the purpose of enabling its employees to share in the profits of the corporation and of distributing the corpus and income of the funds, accumulated

by the Trust in accordance with the Plan, to the participants or their beneficiarier". (Emphasis added).

The Plan was established on February 21, 1974, not June 1, 1973. The words "employees" and "participants" without further qualification, must designate those persons employed both on the date the Plan was established and on the date the language was adopted: February 21, 1974. Petitioners were not employees on February 21, 1974. The only reasonable reading of the terms of the Plan is that the effective date, June 1, 1973, was for its fiscal year and transfer of funds purposes and, further, that the Plan includes only those who were employed at the time it was established.

Petitioners' claim, constituting themselves as participants in the Plan, was correctly decided by the district court, and the decision of that court was correctly affirmed by the Fifth Circuit. Furthermore, petitioners here purport to raise an issue which, in fact, merely calls for this Court to substitute its judgment for that of the district court and that of the Fifth Circuit. Both of those courts held expressly that petitioners are not participants in the Plan, as its trustees properly determined.

CONCLUSION

Petitioners have failed twice below to constitute themselves as participants in the Plan where it does not so provide and where the law does not so permit. The judgments below, that petitioners take nothing, were right in both law and equity. Petitioners have shown nothing, and there is nothing, which would merit a review of those judgments by this Court. Accordingly, the Petition should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, N. Henry Simpson III, one of the counsel for respondents, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of July, 1981, I served a copy of the foregoing Respondents' Brief in Opposition by mailing three copies in a duly addressed envelope, first class postage prepaid, to Robert Ardine (Dean) Carlton, The Carlton Firm, 3109 Carlisle, P. O. Box 19427, Dallas, Texas 75219, counsel for petitioners.

N. Henry Simpson III